

111 FERC ¶ 61,368
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Oklahoma Gas and Electric Company
OGE Energy Resources, Inc.

Docket Nos. ER98-511-002
ER98-511-003
ER98-511-004
ER97-4345-014
ER97-4345-015
ER97-4345-016
EL05-107-000

ORDER ON UPDATED MARKET POWER ANALYSIS,
ACCEPTING REVISED TARIFF SHEETS,
INSTITUTING SECTION 206 PROCEEDING AND
ESTABLISHING REFUND EFFECTIVE DATE

(Issued June 7, 2005)

1. On February 7, 2005, Oklahoma Gas and Electric Company (OG&E) and OGE Energy Resources (OERI) (collectively, the OGE Companies) submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.¹ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.² OGE Companies also filed market-based rate tariff revisions to incorporate the market behavior rules.³

¹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

² *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2005). In its February 7, 2005 filing, OGE submitted tariff revisions incorporating the

(continued)

2. The February 7, 2005 filing indicates that OGE Companies pass the pivotal supplier screen but fail the wholesale market share screen for each of the four seasons in OG&E's control area.⁴

3. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)⁵ and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether OGE Companies may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the OG&E control area because the filing indicates that this is the geographic market for which OGE Companies fail the wholesale market share screen.

4. In addition, OGE Companies state that they pass the pivotal supplier and wholesale market share screens in each of the directly interconnected first-tier control areas examined. However, the Commission is unable to conclude that OGE Companies satisfy the Commission's generation market power standard for market-based rate authority in the first-tier control areas of OG&E. Accordingly, in this order, the Commission directs OGE Companies to make a compliance filing within 30 days of the date of this order to support and make any necessary revisions to its generation market power analysis for its first-tier control areas.

5. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

6. On December 22, 2003, OGE Companies filed an updated market power analysis utilizing a Supply Margin Assessment (SMA).

7. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen

Commission's market behavior rules for Oklahoma Gas and Electric Company and OGE Energy Resources. Oklahoma Gas and Electric Company, FERC Electric Tariff, First Revised Volume No. 3, Original Sheet Nos. 7 and 8; OGE Energy Resources, Inc., Second Revised Rate Schedule FERC No. 1, Original Sheet Nos. 4 and 5.

⁴ OG&E's analysis shows market shares as high as 77 percent.

⁵ 16 U.S.C. § 824e (2000).

and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁶ The May 13 Order directed OGE Companies to file within 270 days of the issuance of that order revised generation market power analyses based on the two indicative screens.⁷

8. On February 7, 2005, OGE Companies filed an updated market power analysis, amending its earlier analysis in compliance with the Commission's May 13 Order.

9. OGE Energy Corporation, OG&E's and OERI's parent company, is an energy and energy services provider of both electricity and natural gas in the south central United States. OG&E generates, transmits, distributes and sells electricity in Oklahoma and western Arkansas. OGE Companies state that OG&E owns and operates generating stations with a total nameplate capacity of 6,875 megawatts (MW), including its 77 percent (400 MW) share of the McClain generating facility. OERI markets energy products including natural gas and electricity and provides energy-related services. OGE Companies state that an affiliate, Enogex, Inc. and its subsidiaries (collectively, Enogex) produce, gather, process, transport, market and store natural gas and produce, transport, and market natural gas liquids in Oklahoma, Arkansas and West Texas. Enogex owns and operates an intrastate gas pipeline system in Oklahoma, and holds an interest in Ozark Gas Transmission, an interstate gas pipeline. OGE Companies state that both of these pipelines serve competing generators.

Description of OGE Companies' Filings

10. In its filing, OGE Companies submitted the results of the two generation market power screens. OGE Companies state that they pass the pivotal supplier screen in the OG&E control area and in each directly interconnected control area. OGE Companies also submitted the results of the wholesale market share screen for the OG&E control area and its directly interconnected control areas. OGE Companies indicate that they pass the wholesale market share screen in each directly interconnected control area, but

⁶ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

⁷ *See* May 13 Order at Ordering Paragraph (A).

concede that they fail the wholesale market share screen for each season in the OG&E control area.

11. As required in the May 13 Order, OGE Companies also provided updated information on the other three parts of the Commission's four-part market-based rates analysis.

Notice of Filing and Responsive Pleadings

12. Notice of the December 22, 2003 filing of OGE Companies' updated market power analysis was published in the *Federal Register*, 69 Fed. Reg. 1712 (2004), with interventions or protests due on or before January 14, 2004. The Oklahoma Corporation Commission (Oklahoma Commission) filed an out-of-time motion to intervene on January 26, 2004.

13. InterGen Services, Inc. and Redbud Energy L.P. (collectively, InterGen) filed a timely intervention and protest on January 14, 2004. InterGen requested that the Commission revoke OGE Companies' market-based rate authority because OGE Companies ultimately fail the SMA. InterGen argued that OGE Companies would fail the SMA test if they accounted for the transmission constraints faced by the Redbud generating facility within OG&E's system. OGE Companies filed an answer to InterGen on January 29, 2004, stating that InterGen's criticism of the SMA analysis performed by OGE Companies ignores the purpose of the Commission's SMA analysis and that membership in the Southwest Power Pool (SPP) negates any possibility of transmission market power.

14. Powersmith Cogeneration Project, L.P. (Powersmith) filed an out-of-time intervention and protest on January 22, 2004. Powersmith requested that the Commission reject OGE Companies' market power analysis because OGE Companies improperly exclude from the SMA all generation committed to serve OG&E's native load, and that the Commission should not renew OGE Companies' market-based rate authority until the Commission has addressed vertical and horizontal market power concerns in the McClain acquisition proceeding. OGE Companies filed an answer to Powersmith's motion to intervene out-of-time on February 6, 2004, stating that Powersmith's interest in the McClain proceeding did not give it sufficient interest in the instant proceeding and that Powersmith did not show good cause for its untimely intervention.

15. Notice of the February 7, 2005 filing of OGE Companies' revised updated market power analysis was published in the *Federal Register*, 70 Fed. Reg. 8357 (2005), with interventions or protests due on or before February 28, 2005. On February 28, 2005, Oklahoma Municipal Power Authority (OMPA) filed a timely motion to intervene and protest, and on March 4, 2005, OMPA withdrew that portion of its February 28 pleading setting forth its protest, but asked to remain as an intervenor.

16. On February 28, 2005, Redbud Energy L.P. (Redbud) filed a timely motion to intervene and protest. Redbud requested that the Commission reject OGE Companies' contestable load analysis and implement immediate mitigation because OGE Companies failed to pass the wholesale market share screen in the OG&E control area. On March 15, 2005, OGE Companies filed a response to Redbud, stating that Redbud's mitigation proposals are outside the scope of this market-based rate proceeding.

17. On April 1, 2005, AES Shady Point, LLC (AES) filed an out-of-time motion to intervene and protest, requesting that the Commission revoke OGE Companies' market-based rates in the OG&E control area unless OG&E agrees to adopt the mitigation measures proposed by AES. On April 18, 2005, OGE Companies filed an answer in opposition to AES' motion to intervene out-of-time. In the answer, OGE argues that the Commission should reject AES's motion because it is out-of-time and AES does not have a legitimate interest in the proceeding.

18. Notice of the April 11, 2005 and April 20, 2005 filings of complete versions, including redlined pages, of OGE Companies' proposed tariff sheet revisions containing market behavior rules was published in the *Federal Register*, 70 Fed. Reg. 22,859 (2005), with interventions or protests due on or before May 2, 2005.⁸ On May 2, 2005, AES responded to OGE Companies' answer, pointing out that their protest was now timely.

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given its interest in this proceeding, the early stage of this proceeding and the absence of any undue delay or prejudice, the Commission finds good cause to grant the untimely and unopposed motion to intervene of the Oklahoma Commission.

20. We will grant Powersmith's and AES's untimely motions to intervene. Notwithstanding OGE Companies' opposition, we find that good cause exists to grant Powersmith's and AES's motions to intervene out of time. Powersmith and AES have complied with the Commission's regulations concerning intervention, including making a showing that, consistent with Rule 214(b)(2)(ii) of the Commission's Rules of Practice and Procedure, they have interests that may be directly affected by the outcome of this proceeding.

⁸ These filings were made in response to an administrative request by Commission Staff. The notices for both filings listed May 2, 2005 as the deadline for interventions or protests.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. The Commission will accept OGE Companies' answers because they have provided information that assisted us in our decision-making process.

Discussion

Market-Based Rate Authorization

22. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁹

Generation Market Power

23. OGE Companies state in their filing that OGE Companies' share of uncommitted capacity in the OG&E control area exceeds 55 percent for each of the four seasons during the relevant time period. Consequently, OGE Companies fail the wholesale market share screen in the OG&E control area.

24. OGE Companies present evidence to rebut the presumption of market power established by their failure of the wholesale market share screen. According to OGE Companies, despite their screen failures, they do not have market power because the screen does not account for the "full requirements" customers within the OGE market that are subject to long-term contracts that require them to purchase all of their power from OGE Companies. OGE Companies submit a "contestable load analysis" that removes the load of these customers from the wholesale market. They argue that under the contestable load analysis, only about 70 MW of the 673 MW wholesale market is actually contestable.

25. As outlined in the April 14 Order, OGE Companies' failure of the wholesale market share screen in the OG&E control area provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the OG&E control area, to determine whether OGE Companies may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is

⁹ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

26. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that OGE Companies have market power in the OG&E control area. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, OGE Companies will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁰ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether OGE Companies do or do not possess market power.¹¹ In this regard, the Commission will further examine in conjunction with other evidence submitted in the section 206 proceeding, the information that OGE Companies submitted to support its contestable load analysis.

27. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,¹² the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-107-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by October 31, 2005.

28. The filing indicates that OGE Companies pass the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. However, the Commission is unable to find here that OGE Companies

¹⁰ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

¹¹ *Id.* at P 37.

¹² See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

satisfy the Commission's generation market power standard for market-based rate authority in the first-tier control areas of OG&E without a compliance filing.

29. Regarding import capability for their first-tier control areas, OGE Companies state that they relied primarily upon the results of a study conducted by SPP. OGE Companies state that they also utilized the results of simultaneous transmission import capability studies submitted to the Commission by Entergy Operating Companies (Entergy) for imports into Entergy's market, and by AEP for imports into the Southwestern Power Administration (SWPA) market.¹³ The Entergy and AEP studies on which OGE Companies rely have previously been accepted by the Commission.¹⁴ OGE Companies filed most of the required supporting information for the SPP study. However, the supporting data and workpapers for the submitted SPP study did not include the text readable power flow, contingency, monitored facility, super area, and transaction files (example file types: .raw, .sup, .mon, .con, .tra, and .trn) used as inputs into the model utilized by SPP. Further, the SPP study provided by OGE Companies does not indicate whether any of the lines were limited by stability rather than by thermal limits. The study also does not appear to include the impact of historical short-term transmission reservations made by OG&E, if any, on the simultaneous import capacity of the OG&E market area.¹⁵ OGE Companies are directed to file the omitted information and data files that support their simultaneous transmission import capability study consistent with the requirements set forth in Appendix E of the April 14 Order, for their first-tier control areas, within 30 days of the date of this order. If OGE Companies choose to file cost-based rates or a mitigation plan that does not require simultaneous import capability information, rather than a Delivered Price Test, then OGE Companies are not required to file any further supporting data for the SPP study.

30. The OGE Companies did not submit complete data or work papers to support their indicative screens for all the first-tier markets. The Commission stated that applicants are required to submit the data used to conduct the screens, including appropriate support and work papers.¹⁶ Specifically, hourly load data for the Western Farmers Electric

¹³ OGE Companies state that they relied upon the study submitted by Entergy in Docket No. ER91-569, compliance filing dated August 9, 2004, for the screens concerning the Entergy control area, and by AEP, in Docket No. ER96-2495-016, compliance filing dated August 9, 2004, for the SWPA control area.

¹⁴ *AEP Power Marketing, Inc.*, 109 FERC ¶ 61,276 at P 20 (2004); *Entergy Services, Inc.*, 109 FERC ¶ 61,282 at P 32 (2004).

¹⁵ Short-term refers to transmission reservations of less than one year that occurred during the four historical seasonal peaks included in the study.

¹⁶ See April 14 Order, 107 FERC ¶ 61,018 at Appendix G.

Cooperative (WFEC) and Grand River Dam Authority (GRDA) markets included in the analysis of first-tier markets was not provided. Additionally, generation data for the SWPA and GRDA first-tier markets was not provided. Finally, the underlying data and work papers for the planned outage calculations used in the Western Resources (WR), Entergy and Central and Southwest first-tier market share screens were not provided. Therefore, OGE Companies are directed to file data and work papers as required in Appendix G of the April 14 Order, for its first-tier control areas, within 30 days of the date of this order.

31. The Commission finds that OGE Companies conditionally satisfy the generation market power standard with respect to OG&E's first-tier control areas, pending Commission acceptance of the compliance filings directed above.

32. Redbud, in its February 28, 2005 protest, and AES, in its April 1, 2005 protest object to OGE Companies' proposed use of a contestable load screen. They argue that the Commission has not allowed applicants to substitute screens which they can pass as a defense for failing the required screens.¹⁷ Redbud and AES also assert that OGE Companies are effectively foreclosing all the competing generation in the relevant market by refusing to buy power from lower-cost competitors; instead they assert that OGE Companies' transmission-owning OG&E affiliate is dispatching higher cost generation owned by OG&E. Redbud asks that the Commission order OGE Companies to include Redbud in OG&E's security constrained economic dispatch protocol on terms equal to OGE Companies' own resources until SPP becomes a full-fledged Regional Transmission Organization (RTO) with market monitoring and mitigation rules in place. AES further states that the Commission should order OGE Companies to establish, for OG&E, a state-supervised competitive procurement program with independent oversight of bid evaluation and selection of long-term power supplies. Redbud states that if economic dispatch were installed immediately, they could make full use of the increased transmission access to OG&E markets that have been ordered by the Commission. Redbud and AES both ask for immediate mitigation since they claim that OGE Companies are currently exercising market power. In its January 22, 2004 protest, Powersmith argues that OG&E's acquisition of the McClain Generating unit will exacerbate the problems caused by OGE Companies' vertical and horizontal market power.

33. OGE Companies respond that providing the immediate mitigation Redbud seeks would bypass procedures outlined in the April 14 and July 8 Orders. OGE Companies state that these procedures require that the Commission first find that the applicants can exercise market power before imposing mitigation or revoking market-based rates. OGE

¹⁷ Citing *American Electric Power Co.*, 109 FERC ¶ 61,276, at P 24 (2004), *reh'g pending* (AEP).

Companies also argue that Redbud's protest is being made in the wrong forum. OGE Companies state that the Commission has no authority to order the Oklahoma Commission to impose the competitive power procurement plan requested by AES on OG&E, or to supervise such a plan. OGE Companies state that utility power purchase rules are currently being addressed in a state regulatory proceeding.¹⁸ OGE Companies also claim that Redbud, itself, has made the decision not to pay for transmission upgrades that would allow it to sell power to additional markets. OGE Companies also argue that Powersmith's concern's regarding the McClain acquisition should be addressed in Docket No. EC03-131-000.

34. With regard to the protests filed in response to the SMA analysis utilized in the OGE Companies' December 2003 updated market power analysis, we note that the Commission has replaced the SMA analysis with the indicative screens, as discussed in the April 14, May 13, and July 8 Orders. In addition, we have reviewed the OGE Companies' generation market power analysis under the two new indicative screens, the pivotal supplier screen and the wholesale market share screen, and we institute a section 206 proceeding based on the OGE Companies' failure of the wholesale market share screen in the OG&E control area. On this basis, we believe that the concerns of InterGen and Powersmith regarding the SMA have been adequately addressed.

35. The concerns of Powersmith and InterGen concerning vertical and horizontal market power related to the McClain acquisition have been addressed by the Commission in the orders related to the McClain acquisition.¹⁹ In the December 18 Order, the Commission found that the acquisition of McClain by OG&E would harm competition by increasing the market power of OGE Companies.²⁰ In the July 2 Order, the Commission addressed the increased vertical and horizontal market power concerns through: (1) the construction of a 600 MW "bridge" (600 MW Bridge) between InterGen's Redbud generating plant and the OG&E control area by upgrading the Draper substation;²¹ (2) transmission upgrades at OG&E's Ft. Smith interconnection with Entergy's

¹⁸ OGE Companies refer to a March 10, 2005 issuance by the Oklahoma Corporation Commission of a Notice of Inquiry into Guidelines for Establishing Rules for Competitive Bidding and Prudence Reviews for Electric Utility Providers, Cause No. PUD200500129.

¹⁹ *Oklahoma Gas and Electric Company*, 105 FERC ¶ 61,297 (2003) (December 18 Order), *Oklahoma Gas and Electric Company and NRG McClain LLC*, 108 FERC ¶ 61,004 (2004) (July 2 Order), *Oklahoma Gas and Electric Company and NRG McClain LLC, reh'g denied*, 111 FERC ¶ 61,075 (2005) (April 18 Order).

²⁰ December 18 Order, 105 FERC ¶ 61,297 at P 37.

²¹ July 2 Order, 108 FERC ¶ 61,004 at P 14.

transmission system;²² (3) redispatch, at no cost to InterGen, of up to 600 MW of power from Redbud to any wholesale customer within OG&E that InterGen acquires until the 600 MW Bridge is completed;²³ and (4) an independent market monitor that, along with other duties outlined in the order, would oversee that redispatch, submit quarterly reports to the Commission that summarize and analyze any market events that result in a significant increase in wholesale prices, foreclosure of competition to competing suppliers, or any other anticompetitive behavior.²⁴ To date, the market monitor has not yet reported any such behavior. In addition, we will consider in the context of the generation market power section 206 investigation in Docket No. EL05-107-000 all generation assets OG&E owns or controls in the relevant geographic market, including the McClain generation facility.

36. With regard to Redbud's request for economic dispatch, we note that such a plan was considered in the July 2 Order and April 18 Order on rehearing, and rejected in favor of the plan outlined above.²⁵ Additionally, Redbud and other suppliers were not guaranteed use of the 600 MW of additional transmission capacity, the July 2 Order only required that it be made available to them.²⁶ The April 18 Order rejected InterGen's claims of buyer power with respect to the change in such power due to the McClain acquisition. The issues raised by AES and Redbud in the instant proceeding regarding buyer market power are troubling. However, addressing them here would be a notable change in Commission policy because allegations as to alleged buyer market power go beyond the scope of the Commission's current market-based rate analysis. Nevertheless, the Commission will, as part of the "Other Barriers to Entry" prong of our four part market-based rate analysis, consider buyer market power in the generic rulemaking proceeding in Docket No. RM04-7-000.

Transmission Market Power

37. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. OGE Companies state that OG&E

²² *Id.*

²³ *Id.*

²⁴ *Id.* at P 20.

²⁵ April 18 Order, 111 FERC ¶ 61,075 at P 16, and July 2 Order, 108 FERC ¶ 61,004 at Chairman Wood's concurrence.

²⁶ July 2 Order, 108 FERC ¶ 61,004 at P 14.

has an OATT on file with the Commission, which was approved by the Commission.²⁷ OGE Companies also state that their transmission-owning affiliate, OG&E, is committed to a Regional Transmission Organization through its membership in the SPP.

38. Intervenors have raised concerns regarding the exercise of transmission market power by OGE Companies within the OG&E market area through the preferential dispatch of OG&E generation. InterGen claims in its January 14, 2004 protest that being a signatory to an OATT does not prevent OG&E from using its transmission facilities to frustrate entry by competitors. InterGen suggests revocation of OG&E's market-based rate authority or an independent monitor to interface with SPP in the administration of the OASIS as related to OG&E's calculation of Available Transmission Capacity and redispatch alternatives.

39. However, those protests have previously been addressed in the July 2 and April 18 Orders, a market monitor is currently overseeing the redispatch of generation, and no new factual information regarding the exercise of transmission market power has been submitted. Accordingly, the Commission finds that OGE Companies satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

40. OGE Companies state that they do not have the ability to erect any barriers to entry. OGE Companies state that neither OG&E nor their affiliates exercise control over critical sites for new capacity development in relevant markets, and that the SPP has an active market for the development of merchant plants.²⁸ OGE Companies also state that OG&E affiliates Enogex and Ozark Gas Transmission System operate natural gas pipelines which supply gas to competing generators but that, as the Commission previously held, should OGE Companies or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of OGE Companies' authority to sell power at market-based rates.²⁹ Based on these representations, the Commission is satisfied that the OGE Companies cannot erect barriers to entry.

²⁷ *Oklahoma Gas & Electric Co.*, 81 FERC ¶ 61,333 (1997).

²⁸ See February 7, 2005 Filing, p. 16.

²⁹ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

Affiliate Abuse

41. The Commission is also concerned with the potential for affiliate abuse. OGE Companies state that OERI's market-based rate tariff contains the code of conduct required by the Commission for all power marketers with public utility affiliates. OGE Companies state that the code of conduct places restrictions on the ability of OERI to enter into transactions with OG&E, including transactions for non-power goods and services, and sets forth the conditions that must be met in order for OERI to transact with OGE. In addition, no intervenors have raised affiliate abuse concerns.

42. The Commission's review of the OGE Companies' market-based rate tariffs, however, reveals that the tariffs for OERI and OG&E do not state that they will not make sales to affiliates "without first receiving" Commission authorization of the transaction under section 205 of the FPA.³⁰ Therefore, consistent with Commission precedent, OERI and OG&E are directed to make a compliance filing within 30 days of the date of issuance of this order to revise their market-based rate tariff to include such language.³¹ Based on these representations, and subject to the tariff revisions we direct herein, the Commission finds that the OGE Companies satisfy the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

43. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.³² Electric

³⁰ OGE Energy Resources, Inc., Second Revised Rate Schedule FERC No. 1, Original Sheet Nos. 2 and 3; Oklahoma Gas and Electric Company, FERC Electric Tariff, First Revised Volume No. 3, Original Sheet No. 1.

³¹ *Aquila Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

³² *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.³³

44. OGE Companies must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.³⁴ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, OGE Companies are directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

The Commission orders:

(A) OGE Companies are directed, within 30 days of the date of issuance of this order, to file data and work papers to support and make any necessary revision to their generation market power analysis for their first-tier control areas, as discussed in the body of this order.

(B) OGE Companies' revised tariff sheets including market behavior rules are hereby accepted.

³³ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

³⁴ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175 (2005).

(C) OGE Companies are directed, within 30 days of the date of issuance of this order, to revise the affiliate sales prohibition language in their tariffs, as discussed in the body of this order.

(D) OGE Companies' updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filings directed in Ordering Paragraphs (A) and (C), as discussed in the body of this order.

(E) OGE Companies are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652, as discussed in the body of this order.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-107-000 concerning the justness and reasonableness of OGE Companies' market-based rates in the OG&E control area, as discussed in the body of this order.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-107-000.

(H) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

(I) For the OG&E control area, OGE Companies are directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates, as discussed in the body of this order.

By the Commission. Commissioner Kelliher concurring with a
separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Oklahoma Gas and Electric Company
OGE Energy Resources, Inc.

Docket Nos. ER98-511-002
ER98-511-003
ER98-511-004
ER97-4345-014
ER97-4345-015
ER97-4345-016
EL05-107-000

(Issued June 7, 2005)

Joseph T. KELLIHER, Commissioner *concurring*:

This order finds that issues raised in this proceeding concerning allegations of buyer market power are “troubling,” but that addressing these issues in this proceeding “would be a notable change in Commission policy”³⁵ For this reason, the order commits that the Commission “will, as part of the ‘Other Barriers to Entry’ prong of our our part market-based rate analysis, consider buyer market power in the generic rulemaking proceeding in Docket No. RM04-7-000.”³⁶

I agree with the Commission’s findings in this order. However, to the extent that some might read the above language to imply that we are resolved to expand the “Other Barriers to Entry” prong of our current four part market power analysis to include buyer market power, I clarify that the Commission has only committed to consider buyer market power in the course of the rulemaking, nothing more.

Joseph T. Kelliher

³⁵ See *supra* P 36.

³⁶ *Id.*